COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Case No.2016 - P - 1158

ESSEX REGIONAL RETIREMENT BOARD,
PLAINTIFF-APPELLANT

vs.

JUSTICES OF THE SALEM DIVISION DISTRICT COURT
DEPARTMENT OF THE TRIAL COURT AND JOHN SWALLOW,
DEFENDANTS-APPELLEES

ON APPEAL
FROM A JUDGMENT OF THE ESSEX COUNTY SUPERIOR COURT

BRIEF OF THE PLAINTIFF-APPELLANT

ESSEX REGIONAL RETIREMENT BOARD

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Dated: September 29, 2016

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue on appeal is whether the Essex Regional Retirement Board's determination that John Swallow's multiple criminal convictions were violation of the laws applicable to his office or position pursuant to M.G.L. c. 32, § 15(4) was supported by substantial evidence and not erroneous as a matter of law.

STATEMENT OF THE CASE AND PROCEDURAL SUMMARY

The Plaintiff-Appellant in this action, the Essex Regional Retirement Board ("Board"), seeks through this appeal that this Honorable Court vacate the Superior Court's June 1, 2016 decision that John Swallow's ("Swallow") criminal convictions were not violations of the laws applicable to his office or position as that phrase is defined in M.G.L. c. 32, § 15(4) and the interpretive case law. On December 30, 2014 the Board determined that former Town of Manchester Police Officer Swallow's January 22, 2013 criminal convictions for (1) assault and battery in violation of M.G.L. c. 265, § 13A; (2) discharge of a firearm within 500 feet of a building in violation of M.G.L. c. 269, § 12E; (3) assault with dangerous weapon in violation of M.G.L. c. 265, § 15B(b); (4) three (3) counts of improper storage of a firearm in

violation of M.G.L. c. 140, § 131L(a)&(b) and (5) intimidation of a witness in violation of M.G.L. c. 268, § 13B, were violations of his office or position pursuant to M.G.L. c. 32, § 15(4), thus requiring a pension forfeiture.

Swallow timely appealed the Board's decision to the Essex District Court in Salem, which on May 18, 2015 reversed the Board's decision (McCabe, J.), finding that since there was "no evidence of any direct link" between Swallow's criminal convictions and his employment; there was "no violation of any identifiable law applicable to … his position as a police officer;" and "the criminal statute under which Mr. Swallow was convicted makes no reference to public employment," the Board's decision was vacated and Swallow was entitled to a retirement allowance.

The Board timely filed a complaint in the nature of certiorari with the Essex Superior Court, and the parties filed cross-motions for judgment on the pleadings. On June 1, 2016 the Superior Court (Lang, J.) allowed Swallow's motion and denied the Board's motion, finding that given M.G.L. c. 32, § 15(4)'s narrow scope, the record did not support a pension forfeiture.

STATEMENT OF THE FACTS

The facts underlying this appeal are not in dispute. Swallow (DOB 12/29/57) was employed by the Manchester Police Department from March 1, 1989 until his termination on January 4, 2013. (Appendix ("A."), Vol. I, 76; Vol. II, 316-317) Lauren Noonan ("Noonan") is Swallow's spouse. Noonan is employed as a registered nurse. (A., Vol. I, 146) During the period from 1988 to June 2012, Swallow worked approximately 40 hours a week as a police officer in Manchester, while also working another approximately 60 hours a week as a paramedic for Northeast Ambulance. (A., Vol. I, 76-77)

In or around June 2012, Swallow was placed on paid administrative leave pending investigation of an allegation that he inappropriately touched Noonan's niece. Swallow turned in his badge and service revolver at this time, but retained his license to carry a firearm. Northeast Ambulance also suspended Swallow while the investigation was ongoing. No formal charges were ever brought against Swallow regarding this incident. (A., Vol. I, 35, 83, 155)

On October 26, 2012, Swallow and Noonan returned home from running errands, and Swallow began to drink

excessively. Swallow became belligerent towards Noonan, and when Noonan observed Swallow put his shoes on, she was concerned about him driving in his state of intoxication so she proceeded to locate the keys to his car and motorcycle in order to prevent him from driving. When she went back to the kitchen to look for her keys they were missing. Noonan confronted Swallow about the location of her keys and he denied taking her keys. Swallow eventually went to the second floor and Noonan followed, and she observed Swallow retrieving her cell phone from the toilet and wiping it off with a towel. A brief argument ensued in which Noonan told Swallow she had "had enough" and that she wanted him to leave. When Swallow refused to leave Noonan once again asked him to leave, and she indicated that if he didn't leave she would testify against him in the case involving her niece. Noonan walked out of the room and when she returned, Swallow had a gun and threatened to kill the dog, and also waived the gun in Noonan's face. Noonan walked out of the room and went to a neighbor's house next door, and while in the neighbor's driveway before getting to the house, she heard a single gun shot. (A., Vol. I, 94-95, 157-162) According to the Beverly Police

Department's report filed regarding the incident, Noonan told the reporting officer that the comment she made about testifying against him, "enraged Mr. Swallow as he went to his bedroom and returned a few moments later to his wifes (sic) bedroom, grabbed her by the shirt and then pointed the gun at her." (A., Vol. II, 287)

Swallow considered the gun shot a "brave shot" designed to determine whether the next shot should be aimed at himself, and when the bullet grazed his hand he realized that he could not do it, put the gun down and went out and sat on his front steps. (A., Vol. I, 95) Swallow was arrested by the Beverly Police that same night and charged with several criminal offenses. (A., Vol. II, 293-295) From the time of his arrest until March 29, 2013 Swallow was incarcerated in the Middleton Jail. (A., Vol. I, 87-88, 165)

Following his arrest, on or about October 29, 2012 Town of Manchester ("Manchester") Town Administrator Wayne Melville ("Melville") suspended Swallow from his position as a police officer, without pay. (A., Vol. I, 29) Sometime in November 2012 Swallow and Noonan began to discuss his retirement, and with the assistance of Swallow's legal counsel,

Noonan obtained two letters Swallow signed to send to Manchester and the Board, respectively. The letter to the Board was dated December 18, 2012 and the Board date stamped it the same date, and the letter states it was an "intent for retirement effective this date," and the letter to Manchester states that he "submitted my retirement to the Essex County Retirement Board effective December 18, 2012." (A., Vol. I, 165-169; Vol. II, 314, 343-344)

At some point between October 29, 2012 and January 4, 2013, third parties notified Swallow that with respect to his October 29, 2012 suspension and the events relating thereto, Manchester had scheduled a hearing for January 4, 2013. The October 29, 2012 suspension letter was never produced for the hearing. (A., Vol. I, 92-93) Between the time of Swallow's suspension on October 29, 2012 and January 4, 2013, discussions ensued between Manchester and Swallow's representatives that involved his waiving his health insurance as a retiree in exchange for Manchester not contesting his retirement. Swallow never agreed to waive his health insurance. (A., Vol. I, 31, 170-178) Noonan hand-delivered the December 2012 letter to Melville's office on January 3, 2013. (A. Vol. I,

168) On January 4, 2013, following a hearing at which no one representing Swallow's interests appeared, Melville terminated Swallow. (A., Vol. I, 31; Vol. II, 316-317) Swallow did not realize there was any difference between resigning and retiring. (A., Vol. I, 106) Neither Noonan nor anyone on her behalf or on Swallow's behalf contested Manchester's decision to terminate Swallow. (A., Vol. I, 178)

On January 22, 2013 Swallow pled guilty in Salem District Court to (1) assault and battery in violation of M.G.L. c. 265, § 13A; (2) discharge of a firearm within 500 feet of a building in violation of M.G.L. c. 269, § 12E; (3) assault with dangerous weapon in violation of M.G.L. c. 265, § 15B(b); (4) three (3) counts of improper storage of a firearm in violation of M.G.L. c. 140, § 131L(a)&(b) and (5) intimidation of a witness in violation of M.G.L. c. 268, § 13B. (A., Vol. II, 303-312)

On February 14, 2013, Manchester submitted a Notification of Separation From Service form to the Board noting that Swallow was involuntarily discharged, making reference to Melville's January 4, 2013 letter. (A., Vol. II, 319) On April 8, 2013 Swallow submitted to the Board his Application for

Voluntary Superannuation Retirement ("Application"), requesting December 18, 2012 as his effective date of retirement. (A., Vol. II, 321-326) Upon receiving the Application, and being aware of Swallow's criminal convictions, the Board instituted proceedings pursuant to M.G.L. c. 32, §§ 15(2) and 16(1)(a) to determine whether Swallow's criminal convictions were violations of the laws applicable to his office or position in violation of M.G.L. c. 32, § 15(4).

On December 30, 2013, following two (2) days of evidentiary hearings at which Swallow (1) appeared and testified, (2) was represented by counsel and (3) was permitted to call and cross-examine witnesses, the Board determined that Swallow's criminal convictions were violations of the law applicable to his office or position pursuant to M.G.L. c. 32, § 15(4), thus requiring a pension forfeiture. (A., Vol. II, 234-259)[1]

[1] The Board also determined that Swallow was terminated on January 4, 2012 as the result of moral turpitude, thus disqualifying him from receiving a superannuation retirement allowance pursuant to M.G.L. c. 32, § 10(1). That issue is not before this court.

SUMMARY OF ARGUMENT

This Court's standard of review is similar to a review pursuant to M.G.L. c. 30A, § 14(7), and is limited to whether the Board's decision was supported by substantial evidence or an error of law. The Board's determination that Swallow's criminal convictions were violations of the laws applicable to his office or position as set forth in M.G.L. c. 32, § 15(4) was both supported by substantial evidence and not erroneous as a matter of law and therefore the Superior Court's decision must be vacated. (pp. 11-14)

M.G.L. c. 32, § 15(4) requires a "direct link" between a member's employment and his criminal conviction(s) to warrant a pension forfeiture. This "direct link" requirement does not mean that the crime itself must reference public employment or the employee's particular position or responsibilities, or that the crime necessarily must have been committed at or during work. However, where the crime itself does not reference public employment or bear a direct factual link through use of the position's resources, there must be some direct connection between the criminal offense and the employee's official capacity

by way of the laws directly applicable to the public position. (pp. 14-17)

Swallow's criminal convictions for (1) assault and battery in violation of M.G.L. c. 265, § 13A; (2) discharge of a firearm within 500 feet of a building in violation of M.G.L. c. 269, § 12E; (3) assault with dangerous weapon in violation of M.G.L. c. 265, § 15B(b); (4) three (3) counts of improper storage of a firearm in violation of M.G.L. c. 140, § 131L(a)&(b) and (5) intimidation of a witness in violation of M.G.L. c. 268, § 13B were violations of the laws applicable to his office or position requiring pension forfeiture. Although these criminal convictions do not specifically reference his position as a police officer, his criminal acts of committing an assault and battery with a dangerous weapon against his wife in the midst of a domestic dispute he instigated in a drunken rage and witness intimidation are inconsistent with the position's requirement that he behave in a manner that brings honor and respect for rather than public distrust of law enforcement.(pp.17-33)

The Board's decision was consistent with this Court's decision in Durkin v. Boston Retirement Board, 83 Mass. App. Ct. 116, 119 (2013), thus this Court

should conclude that the Board's decision was justified. (pp. 33-38)

ARGUMENT

I. THIS COURT'S STANDARD OF REVIEW OF THE BOARD'S DECISION IS EXTREMELY LIMITED AND THE STANDARD TO BE IMPOSED IN A CERTIORARI REVIEW IS SIMILAR IN SCOPE AS A REVIEW CONDUCTED PURSUANT TO M.G.L. C. 30A, § 14(7), THE STATE ADMINISTRATIVE PROCEDURES ACT.

Certiorari Review Standard

The Board recognizes that the scope of judicial review in the nature of certiorari is limited. See State Board of Retirement v. Bulger, 446 Mass. 169, 173 (2006). "Certiorari allows a court to 'correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff.'" Ibid., quoting from Massachusetts Bay Transportation Authority v. Auditor of the Commonwealth, 430 Mass. 783, 790 (2000). In reviewing an administrative decision pursuant to a petition for certiorari, an appellate court reviews the entire record to determine whether the decision is legally tenable and supported by substantial evidence. Doherty v. Retirement Board of Medford, 425 Mass. 130, 135 (1997). In doing so, a reviewing court is not authorized "to make a de novo determination of the

facts, to make different credibility choices, or to draw different inferences from the facts found by the [board]." Id. at 141, quoting from Pyramid Co. v. Architectural Barriers Board, 403 Mass. 126, 130 (1988). As discussed at length below, the Board believes that the Superior Court's decision was neither legally tenable nor supported by substantial evidence, and therefore must be vacated.

The standard of review set forth in M.G.L. c. 30A, § 14(7) permits a court to modify or set aside an administrative agency's decision only if the court determines that the substantial rights of any party have been prejudiced because the agency decision was:

(a) in violation of constitutional provisions; or
(b) in excess of the statutory authority or jurisdiction of the agency; or
(c) based upon error of law; or
(d) made upon unlawful procedure; or
(e) unsupported by substantial evidence; or
(f) unwarranted by facts found by the Court on the record as submitted; or
(g) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

The only pertinent basis for setting aside a retirement board decision rendered pursuant to M.G.L. c. 30A, § 14(7) would be that the decision was based upon error of law or was unsupported by substantial

evidence. Dube v. Contributory Retirement Appeal Board, 50 Mass. App. Ct. 21, 23 (2000); Robinson v. Contributory Retirement Appeal Board, 20 Mass. App. Ct. 634, 635, review denied, 396 Mass. 1102 (1985); Cataldo v. Contributory Retirement Appeal Board, 343 Mass. 312, 314 (1961). M.G.L. c. 30A, § 14(7)(c)(e). M.G.L. c. 30A, § 1(6) further defines "substantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion."

In the present case, this Court must first review the Board's Decision for error under one of the limited sections of M.G.L. c. 30A, § 14(7). This Court must then give due deference to the Board's experience, technical competence and specialized knowledge, and cannot substitute its own opinion for that of the Board unless the Board's decision is unsupported by substantial evidence. M.G.L. c. 30A, § 14(7); Thomas v. Civil Service Commission, 48 Mass. App. Ct. at 451; Lisbon v. Contributory Retirement Appeal Board, 41 Mass. App. Ct. at 257. As noted, this Court must apply the certiorari standard to determine whether the Superior Court's decision was both legally tenable and supported by substantial evidence. Upon review, and as more fully set forth

below, this Court should find that the Board's decision was amply supported by substantial evidence and not based upon error of law. Accordingly, the Superior Court's decision should be vacated, and the Board's decision to rescind Swallow's membership and revoke his pension rights should be reinstated.

II. SWALLOW'S CRIMINAL CONVICTIONS WERE A VIOLATION OF THE LAWS APPLICABLE TO HIS OFFICE OR POSITION THUS REQUIRING PENSION FORFEITURE.

The Statutory Standard and Interpretive Case Law

The parties' fundamental dispute in this case – as with most pension forfeiture cases that reach the appellate level - pertains to the scope of M.G.L. c. 32, § 15 (4), which directs the forfeiture of a pension following certain criminal conduct by a member of a contributory retirement system for public employees. See Retirement Board of Somerville v. Buonomo, 467 Mass. 662, 663 (2014). Section 15(4) states:

> In no event shall any member after final conviction of a criminal offense involving the violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his

> accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero.

In interpreting Section 15(4)'s applicability and limitations, the Supreme Judicial Court looks "to the intent of the Legislature ascertained from all [the statute's] words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished." Garney v. Massachusetts Teachers' Retirement System, 469 Mass. 384, 388 (2014), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934), and cases cited. See Sullivan v. Brookline, 435 Mass. 353, 360 (2001).

Because M.G.L. c. 32, § 15 involves the forfeiture of property, it is penal in nature, and a reviewing court must draw its limits narrowly, so as not to exceed the scope or reach of the penalty as contemplated by the Legislature. State Board of Retirement v. Bulger, 446 Mass. 169 174-175 (2006). See Gaffney v. Contributory Retirement Appeal Board, 423 Mass. 1, 3 & n.3 (1996); Collatos v. Boston Retirement Board, 396 Mass. 684, 686-687 (1986) (G. L.

c. 32, § 15, "imposes a penalty on employees" and "enforce[s] the criminal law by suspending the sword of retirement benefits forfeiture over those employees who otherwise might be tempted to transgress").

The Court has observed previously that "[t]he substantive touchstone [of G. L. c. 32, § 15 (4),] intended by the General Court is criminal activity connected with the office or position. . . . [T]he General Court did not intend pension forfeiture to follow as [an automatic consequence] of any and all criminal convictions. Only those violations related to the member's official capacity were targeted. Looking to the facts of each case for a direct link between the criminal offense and the member's office or position best effectuates the legislative intent of § 15 (4)" (emphasis added). Gaffney, 423 Mass. at 4-5. This "direct link" requirement "does not mean that the crime itself must reference public employment or the employee's particular position or responsibilities," Maher v. Justices of the Quincy Div. of the District Court Department, 67 Mass. App. Ct. 612, 616 (2006), S.C., Maher v. Retirement Board of Quincy, 452 Mass. 517 (2008), cert. denied, 556 U.S. 1166 (2009), or that the crime necessarily must have been committed at

or during work. Durkin v. Boston Retirement Board, 83 Mass. App. Ct. 116, 119 (2013). However, where the crime itself does not reference public employment or bear a direct factual link through use of the position's resources, there must be some direct connection between the criminal offense and the employee's official capacity by way of the laws directly applicable to the public position. Garney, supra at 389; Gaffney, supra at 5.

The Board acknowledges that Swallow's criminal convictions for (1) assault and battery in violation of M.G.L. c. 265, § 13A; (2) discharge of a firearm within 500 feet of a building in violation of M.G.L. c. 269, § 12E; (3) assault with dangerous weapon in violation of M.G.L. c. 265, § 15B(b); (4) three (3) counts of improper storage of a firearm in violation of M.G.L. c. 140, § 131L(a)&(b) and (5) intimidation of a witness in violation of M.G.L. c. 268, § 13B do not specifically reference his position as a police officer. Stated another way, any person could have assaulted and battered his spouse, and if that same person lawfully possessed a handgun could have, assaulted his spouse by pointing a dangerous weapon at his spouse's head while in a drunken rage, recklessly

discharged his firearm within 500 feet of a building, improperly stored firearms and intimidated a witness. The question in this case, and which the Board adversely determined against Swallow, is whether these particular criminal convictions based on these particular facts rise to the level the Court enunciated in Durkin v. Boston Retirement Board, 83 Mass. App. Ct. 116 (2013)

Durkin was one of a trilogy of cases this Court decided on January 18, 2013. Retirement Board of Maynard v. Tyler, 83 Mass. App. Ct. 109 and Flaherty v. Justices of the Haverhill Division of the District Ct. Department of the Trial Court, 83 Mass. App. Ct. 120. Paul Durkin ("Durkin") was a City of Boston Police Officer who after finishing his afternoon shift went to a cookout with his service revolver in his off-duty holster, proceeded to consume alcohol while at the cookout and then continued his drinking at a lounge in Dorchester. As Durkin was leaving the lounge, a fellow police officer, Joseph Behnke ("Behnke") believed Durkin was too intoxicated to drive and offered to drive him to Behnke's

home so that Durkin could sleep there. Durkin agreed and fell asleep on the ride to Behnke's home. Upon arrival at Behnke's home, Durkin awoke, got out of the car and in a very intoxicated state started to walk in a direction away from Behnke's home. Behnke followed Durkin on foot and while asking him to come to his home, Durkin turned around and shot Behnke in the hip. Durkin then proceeded to call someone to come pick him up, and took no steps to render any aid or assistance to Behnke.

In the criminal proceeding which followed Durkin's drunken and reckless actions, he pleaded guilty to assault and battery by means of a dangerous weapon and was sentenced to three (3) years of probation. Thereafter, Durkin applied for a superannuation retirement allowance with the Boston Retirement Board ("BRB"), which following a hearing denied his request to retire. Durkin appealed to District Court, and the District Court Judge upheld the BRB's decision stating "laws prohibit[ing] … assault and battery by means of [a] dangerous weapon [were] certainly applicable to police officers who routinely carry such weapons on and off duty, who are trained extensively in their use and who have specific

rules and regulations regulating their use." Durkin v. Boston Retirement Board, 83 Mass. App. Ct. at 117. In upholding the District Court's decision, this Court cited Attorney General v. McHatton, 428 Mass. 790, 793-794 (1999), quoting from Police Commissioner of Boston v. Civil Service Commission, 22 Mass. App. Ct. 364, 371 (1986):

> "Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities."

See also Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801-802 ("[p]olice officers must … behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. This applies to off-duty as well as on-duty officers.") The nexus required by M.G.L. c. 32, § 15(4) is not that the crime was committed while the member was working, or in a place of work, but only that the criminal behavior be connected with the

member's position. Durkin v. Boston Retirement Board, 83 Mass. App. Ct. at 119. Accordingly, in Durkin this Court held:

> Here, Durkin engaged in the very type of criminal behavior he was required by law to prevent. This violation was directly related to his position as a police officer as it demonstrated a violation of the public's trust as well as a repudiation of his official duties. Clearly, at the heart of a police officer's role is the unwavering obligation to protect life, which Durkin himself recognized at his hearing. His extreme actions violated the integrity of the system which he was sworn to uphold. The board and the District Court judge acted properly in concluding that Durkin's pension is forfeited.

Id. at 118.

It is significant to note that in Durkin this Court referenced the decision rendered that same day in Tyler and said "[n]otwithstanding the high standards placed on firefighters and police officers, not every off-duty illegal act qualifies as a 'violation of the laws applicable to his office or position.' As both Tyler and this matter demonstrate, every case must be decided by examining its own set of unique facts and circumstances (citation omitted)." Durkin, 85 Mass. App. Ct. at 119, fn.5.

In reference to the public trust, the Durkin court said, "[s]imply, an officer who consumes an

excess amount of alcohol and uses his service revolver to shoot, without any justification whatsoever, a fellow officer from a distance of a few feet has sadly breached that trust." What preceded the foregoing statement in Durkin was the well-settled discussion quoted above regarding police officers and their conduct that "brings honor and respect for rather than public distrust of law enforcement personnel." Falmouth, supra. Both the District and Superior Courts concluded - wrongfully in the Board's view - because Swallow used his own weapon rather than his service revolver, that this criminal act coupled with the other four (4) criminal convictions did not breach that trust. The Board believes that the lower court's myopic focus on Durkin's use of his service revolver is misplaced. Respectfully, the upshot of this Court's Durkin opinion appears to be not that he used his service revolver rather than a personal firearm to commit the crime, or that he was intoxicated at the time he committed the crime or that he shot a fellow officer; rather, it is that he committed and assault and battery with a dangerous weapon, and that criminal conviction was sufficient to breach that exclusive trust with which police officers are empowered unlike

any other public employee that resulted in his pension forfeiture.

If one deconstructs Durkin - does that case stand for the legal proposition that a police officer who commits assault and battery with a dangerous weapon would continue to be eligible to receive his pension as long as he commits this criminal act with his own weapon? So if Swallow had shot and killed his wife, such an act would bring "honor and respect for rather than public distrust of law enforcement personnel" because he used his own weapon? The preceding statement is absurd - and that is exactly the point. The Board believes that a fair reading of Durkin is that even if he was stone cold sober and used his personal firearm to shoot a civilian rather than a brother officer, this Court would have reached the same conclusion. What we can narrowly glean from Durkin is that while this Court stated that not all criminal offenses committed by police officers will give rise to pension forfeiture, certainly the crime of assault and battery with a dangerous weapon - one of the several crimes to which Swallow plead guilty - is in the category of crimes if committed by a police officer will result in pension forfeiture. While the

Durkin Court instructed fact finders to examine each case based on "its own set of unique facts and circumstances," it is difficult to imagine a set of circumstances in which a police officer who has been convicted of assault and battery with a dangerous weapon, with that weapon being any firearm, would not have been convicted of a crime in violation of the laws applicable to his office or position resulting in pension forfeiture, particularly in light of this Court's reference to the McHatton and Falmouth cases that discussed police officer conduct. If this Court intended to hold police officers to the same standard as any other public employee, it would not have spent a fair amount of the decision discussing a police officer's duties and responsibilities as they relate to the public trust.

As a result of the decisions in Durkin and Tyler, it can no longer be argued (as it was in Tyler) that every criminal offense committed by a public safety officer that results in a conviction must also result in pension forfeiture. While laying the foundation and setting the standard for the analysis which must be applied in each case, this Court simply stated the premise; it is now up to retirement boards across the

Commonwealth when confronted with a public safety officer who has been convicted of a crime to decide, on a case-by-case basis while examining the unique facts and circumstances of each case and the standard set in Durkin, whether a police officer's criminal conviction based on a specific set of facts should result in a pension forfeiture pursuant to M.G.L. c. 32, § 15(4).

Swallow's anticipated reliance on Garney, supra, is similarly misplaced. In Garney, the Supreme Judicial Court was asked to determine whether pension forfeiture is warranted where a *teacher* has engaged in criminal activity that endangers children generally, but did not involve the students whom he taught, the school district for which he worked, or the use of his teacher status. In Garney, Massachusetts Teachers' Retirement System ("MTRS") determined that teacher Ronald Garney's ("Garney"), who previously pleaded guilty to eleven (11) counts of purchasing and possessing child pornography, in violation of M.G.L. c. 272, § 29C, despite the lack of a factual connection between Garney's crimes and his public position, there was a direct link to his because the position of a teacher is one that holds a special

public trust, and Garney's criminal conduct of possessing child pornography strikes at the "heart" of this position by violating one of its "fundamental tenets," as embodied in the professional standards for teachers. As a result, MTRS determined and the District Court agreed pension forfeiture was warranted. Garney at 390-391.

Garney sought certiorari review with the Superior Court, which vacated the MTRS' decision and the MTRS sought further review with the Appeals Court, and the Supreme Judicial Court transferred the case on its own motion. In finding the MTRS' decision to be an incorrect statutory interpretation, the Court concluded that although Garney's position is one of special public trust, and that criminal conduct of the type Garney committed violated that trust, the violation of that trust is insufficient in and of itself to warrant a M.G.L. c. 32, § 15(4) forfeiture. Rather, the conduct must either directly involve the position or be contrary to a central function of the position as articulated in applicable laws, thereby creating a direct link to the position." Id. at 391.

The Court acknowledged there are certain standards to which a teacher must conform to continue

in the profession but that these parameters for entering or remaining in the teaching profession are not the same as the standard for forfeiting a pension to which an employee has contributed and that he or she earned over the course of many years of public service. Id. See also Bulger, 446 Mass. at 178-179 ("standard for pension forfeiture based on dereliction of duty is more narrow and specific" than standard for dismissal, and not every offense implicating norms and expectations of position necessarily violates applicable law and requires forfeiture); Durkin, 83 Mass. App. Ct. at 119 n.5 ("not every off-duty illegal act qualifies" for forfeiture). The Court also cited Durkin in the dicta noting the distinction between the various types of off-duty conduct that would and would not implicate pension forfeiture. See discussion Garney, 389-390. Ultimately, the Court concluded:

> The narrow basis for our holdings in Bulger and Buonomo demonstrates that G. L. c. 32, § 15 (4), requires something more specific than a violation of a special public trust in the particular public position. The plain language of G. L. c. 32, § 15(4), clearly requires a direct link between the criminal offense and a violation of the laws applicable to the office. Gaffney, 423 Mass. at 4-5. See Bulger, 446 Mass. at 179 (where member is "convicted of a criminal offense that does not involve any violation of the laws applicable to his office or position .

> . . the member does not forfeit his entitlement to a retirement allowance"). Criminal conduct that is merely inconsistent with a concept of special public trust placed in the position or defiant of a general professional norm applicable to the position, but not violative of a fundamental precept of the position embodied in a law applicable to it, may be adequate to warrant dismissal, but it is insufficient to justify forfeiture under G. L. c. 32, § 15 (4). See Bulger, supra at 179-180; Gaffney, 423 Mass. at 4-5. See also Tyler, 83 Mass. App. Ct. at 109-110, 113; Scully, 80 Mass. App. Ct. at 543, 545; Herrick, 77 Mass. App. Ct. at 654.

Id. at 393.

The SJC in Garney specifically referenced Durkin as a case in which there was sufficient evidence to link his off-duty criminal conduct to his position, and described this Court's decision as a forfeiture in which a "police officer convicted of assault and battery by means of dangerous weapon for shooting another officer with [a] department-issued firearm while intoxicated off duty." Garney, 469 Mass. at 390. What was lacking in the SJC's analysis and its Durkin reference was which of the foregoing facts brought this specific off-duty conduct within Section 15(4)'s "violation of the laws applicable to his office or position" requirement: was it the fact that he committed an assault and battery with a dangerous weapon, the fact that his victim was a police officer,

the fact that he used his department issued firearm or fact he was intoxicated - or any combination of these four factors - such that the criminal conviction was sufficient to bring the crime under the Section 15(4) umbrella? Unfortunately, because this Court did not further elaborate on its Durkin analysis, and despite the SJC's apparent rejection of the public trust argument in Garney, it did not specifically repudiate the Durkin public trust analysis, which to the Board suggests that as the SJC first suggested in Gaffney, supra, that a retirement board and a reviewing court must look to the "facts of each case for a direct link between the criminal offense and the member's office or position best effectuates the legislative intent of § 15 (4)" Gaffney, 423 Mass. at 4-5.

The gravamen of Swallow's argument before the Board and in the lower courts for retaining his pension [2] was that while his convictions involved disgraceful off-duty conduct that warranted his

[2] The Board recognizes that as a member of a retirement system, Swallow is entitled to a "retirement allowance" based on a statutory formula which utilizes his age, years of service and salary average for his three highest consecutive years, and the retirement allowance has both a "pension" and "annuity" funding component. For the purpose of this discussion only, the Board's usage of the word "pension" means retirement allowance.

termination, these offenses occurred while on administrative leave, were committed in a jurisdiction other than the municipality in which he served as a police officer and he did not commit the crimes with his service weapon so his criminal convictions were not violations of the laws applicable to his office or position. As the Durkin, Bulger and Maher decisions clearly demonstrate, the fact that Swallow was off-duty at the time he committed his crimes is not relevant. In fact, as the Supreme Judicial Court concluded in Retirement Board of Somerville v. Buonomo, 467 Mass. 662 (2014), a pension forfeiture was proper when a public employee who was also a retiree was convicted of crimes in violation of the laws applicable to his office or position, even though the retiree was receiving his pension from a different retirement system. What this Court needs to clarify is whether Durkin restricts pension forfeiture only in circumstances in which a police officer commits a crime by using his service weapon, and if not whether Swallow's myriad of criminal offenses "demonstrated a violation of the public's trust as well as a repudiation of his official duties." Durkin, supra.

Since Garney involved a teacher, and the decision did not in anyway repudiate or clarify this Court's decision in Durkin, the Board believes that the standard enunciated in Durkin applies in this case, and when applying that standard, Swallow clearly violated the public trust and repudiated his official duties by committing an assault and battery and assault with a dangerous weapon on his wife, improperly storing firearms and intimidating a witness. No reasonable person could disagree that Durkin, coupled with Tyler, supra, stand for the proposition that not all criminal offenses a police officer commits will result in pension forfeiture, and a line must be drawn to distinguish between those criminal offenses and the relevant underlying facts which require pension forfeiture and those which do not.

Although Durkin did not clearly draw that line, it is difficult to imagine that if Durkin had used his personal weapon rather than his service weapon this Court would have ruled differently. As noted earlier in this brief, if that is to be the bright-line test, then a police officer who is convicted of using his service-issued baton ("Billy club") to assault and

batter an individual will forfeit his retirement allowance, but a police officer who used a baseball bat to commit the same crime will not. To continue that analysis, a police officer who commits a robbery using his service revolver would forfeit his pension, but a police officer who commits murder with his personal weapon would not. Given this Court's Durkin analysis, it is difficult to accept that the decision in that case turned on Durkin's use of his service revolver, but that is the issue that must be decided.

The Board believes that Durkin's public trust analysis applies to police officers, and given a police officer's inherent powers of arrest and the authority to carry and discharge his weapon - unlike any other public official or employee - the use of a firearm in the commission of an assault and battery with a dangerous weapon should warrant a pension forfeiture. As this Court noted in Durkin: "It cannot be gainsaid that police officers, who are extensively trained in the use of firearms, and who carry their service revolvers with them while off-duty, have a high degree of responsibility to which the public deserves and demands adherence [footnote omitted]." Durkin, 83 Mass. App. Ct. 118-119. Is the Court prepared to say

that police officers do not have the same "high degree of responsibility to which the public deserves and demands adherence" when carrying a personal weapon? The facts in Durkin were that Durkin was *permitted* but not *required* to carry his service weapon while off duty. Id. at 116. Will the Swallow decision stand for the legal proposition that as long as a police officer uses his personal weapon to commit a crime, he may lose his job but not his pension?

The Board's Determination that Swallow's Criminal Convictions Were Consistent with This Court's Durkin Decision Was Justified

Following Durkin and Tyler's teachings, the Board believes the myriad of criminal offenses of which Swallow was convicted clearly warrants pension forfeiture pursuant to Section 15(4). As the Court noted in Durkin, citing to the District Court's decision, "laws prohibit[ing] … assault and battery by means of [a] dangerous weapon [were] certainly applicable to police officers who routinely carry such weapons of an off duty, who are trained extensively in their use and who have specific rules and regulations regulating their use." Durkin, 83 Mass. App Ct. at 117. The "such weapons" reference was clearly a reference to dangerous weapons such as, but not

limited to, Durkin's service weapon. In addition to his criminal conviction for assault and battery with a dangerous weapon, Swallow was also convicted of assault and battery, discharging his firearm, illegal storage of firearms and witness intimidation. The multitude of offenses strikes at the heart of the duties of a police officer, and although they occurred while he was off-duty and in the jurisdiction in which he resides rather than where he works, they are inextricably linked to his position as a law enforcement officer. It cannot be understated how dangerous and reckless it was for Swallow in an intoxicated state of rage to retrieve a firearm in the heat of a domestic argument, and as a police officer who is trained to de-escalate domestic violence situations he did just the opposite. Only perhaps a lucid moment Swallow demonstrated in his otherwise inebriated state or Noonan's quick thinking to exit the bedroom while she still could prevented the situation from escalating into a far more serious crime. While the Superior Court stated that it did not "cavalierly dismiss" Swallow's assaultive conduct and the battery he perpetrated on his wife with a loaded firearm in the midst of a domestic dispute, its

rationalizing for distinguishing Swallow's conduct from Durkin appears to be akin to "at least he did not shoot her." (A., Vol. II, footnote, p. 383)

Witness intimidation is a serious offense that when successful, often times will allow the most dangerous of criminals to be set free due to the witness' fear of retribution for testifying. The Superior Court also indirectly blamed the victim – Noonan – for threatening to testify against Swallow in the case pending against him for allegedly inappropriately touching her great niece, and then "assume[d] that there was no validity to the child abuse allegation, and Noonan's own testimony suggested that her threat to testify against Swallow was, in effect, a threat to bear false witness against him." (Id.) To what Noonan testified, she said she made a "comment" about her great niece's case and "at that point I knew I should not have said it." (A., Vol. I, 160) In the Beverly Police report regarding the incident, Noonan told the investigating officer, "if you treat me like this I would testify against you," which was more plausibly in reference to his assaultive and belligerent conduct, rather than "bearing false witness" against Swallow since by

Noonan's own admission she had no personal knowledge and was not present when the alleged assault Swallow perpetrated against her great niece supposedly took place. (A., Vol. I, 154, Vol. II, 287) Moreover, the fact that the investigation "was not supported" does mean the abuse did not happen, it simply means Swallow was not prosecuted, and it is equally as plausible that the great niece was a reluctant victim rather than a troubled young girl making unfounded accusations. Nevertheless, the Superior Court seemed to go out of its way to reach strained and unsupported conclusions to excuse Swallow's conduct in an effort to rationalize its decision. How many violent crimes are not prosecuted because of witness intimidation and the fear of retribution?

The proper storage of firearms is one of the first rules of safety taught to law-abiding gun owners, and as a police officer taking possession of a weapons cache Swallow certainly knows the importance of keeping weapons secure, and the potential fatal consequences of unsecured weapons. As the Court noted in Durkin, Swallow's actions were a "violation of the public's trust as well as a repudiation of his official duties" and as such, pension forfeiture is an

unfortunate, but necessary consequence for a violation of the laws applicable to his duties as a police officer.

The Board is in no way suggesting that Durkin stands for the proposition that any criminal offense of which a police officer is convicted will result in a pension forfeiture - this Court has made it abundantly clear in Durkin, Flaherty and Tyler that there must be some tenable and direct connection between the employee's office or position and his criminal conduct. Notwithstanding the foregoing, it is difficult to reconcile why this Court would spend such a great deal of time in Durkin discussing the public trust bestowed upon police officers, citing to McHatton and Falmouth, supra, and Durkin's breach of that trust, if Durkin's use of his service weapon was the only sufficient necessary link between his employment and his crime to warrant a Section 15(4) pension forfeiture. For all the reasons this Court outlined in Durkin, Swallow breached that trust because he committed an assault and battery with a dangerous weapon, having been trained with the use of a dangerous weapon as an integral part of his profession, as well as how the introduction of a

dangerous weapon into a domestic violence situation can quickly turn lethal. In addition to the improper weapons storage - which also could have had lethal consequences - when compounded with the witness intimidation conviction the underlying facts and criminal convictions in this case compel Swallow to forfeit his pension.

CONCLUSION

Based on the foregoing, the Essex Regional Retirement Board respectfully requests that this Court vacate the Superior Court's June 1, 2016 decision and find that the Board's determination that Swallow's criminal convictions violated the laws applicable to his office or position as set forth in M.G.L. c. 32, § 15(4)was justified, thus reinstating his pension forfeiture.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Brief of the Appellant complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(e), Mass. R.A.P. 16(f), Mass. R.A.P. 16(h), Mass. R.A.P. 18, and Mass. R.A.P. 20.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served two copies of the foregoing Brief of the Appellant, the Appendix and related documents via priority mail on the following attorneys of record:

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